

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

**UNITED STATES OF AMERICA** )  
*ex rel.* **S. PRAWER & COMPANY,** )  
**GILBERT PRAWER AND** )  
**HARVEY PRAWER,** )  
 )  
          **PLAINTIFFS/RELATORS** )  
 )  
**v.** )  
 )  
**FLEET BANK OF MAINE AND** )  
**RECOLL MANAGEMENT** )  
**CORPORATION,** )  
 )  
          **DEFENDANTS** )

**Civil No. 93-165-P-H**

**ORDER ON MOTION FOR “NON-JOINDER” OF PRIVATE  
RELATORS OR TO RESTRICT RELATORS’ INVOLVEMENT**

The two remaining defendants in this False Claims Act lawsuit, see 31 U.S.C. § 3729 et seq., have moved for “non-joinder” of the private relators—the equivalent of dismissing them from active participation in the lawsuit—or, in the alternative, to restrict the relators’ involvement. The Government, the party plaintiff with primary responsibility for pursuing the lawsuit, 31 U.S.C. § 3730(c)(1), takes no position on the motion (with one exception that

I discuss infra). The private relators object. The motion is **GRANTED** for the reasons that follow.<sup>1</sup>

On February 7, 1995, the private relators signed a release absolving these two defendants, Fleet Bank of Maine (“Fleet”) and RECOLL Management Corporation (“RECOLL”), with prejudice, from “any and all” “claims, damages, expenses, and liabilities whatsoever, and any and all other claims arising pursuant to any federal or state law, federal or state statute” based upon anything happening “on or prior to the date hereof,” and

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<sup>1</sup> The private relators imply that there is some procedural unfairness in the manner by which I have entertained this motion and the hearing on it.

What happened on this motion is the following: When Fleet and RECOLL first filed the current motion on March 17, 1997, they referred only to the 1994 release. See Mot. for Non-Joinder of Relators at 1. Upon objection by the private relators’ lawyer that the 1995 document had to be considered as well, see Relators Opp’n to Defs.’ Mot. at 1-9, Fleet and RECOLL supplemented their filing with the 1995 release on March 26, 1997, see Supp. Mem. in Support Mot. for Non-Joinder of Relators. As I was preparing for the hearing on the motion, I observed that the 1995 release stated: “Notwithstanding anything herein to the contrary, the rights and obligations set forth in the Settlement Agreement between the parties dated February 8, 1995, remain in full force and effect.” Concerned that I could not properly interpret the 1995 release without the incorporated Settlement Agreement, I directed the Clerk’s Office to notify counsel that the document had not been provided. The defendants’ lawyer then filed the document on July 9, 1997, with copies to opposing counsel. At the July 11, 1997, hearing, the private relators’ lawyer claimed prejudice in the access of the court to the Settlement Agreement and also argued that to properly interpret it I would have to look at a sealed transcript from the ALI, Inc. v. Fishman, Civ. No. 94-25-P-C, case. In order to cure any possible prejudice to the private relators (their lawyer had also argued that he did not interpret the motion as originally filed to have anything to do with attorney fees and I informed him at oral argument that I construed it to include that issue (the defendants had asked that the private relators be completely removed as parties)), I allowed the parties seven days after the filing of the sealed transcript to make any additional written arguments.

As is apparent from the text of my decision, I ultimately do not rely on either the Settlement Agreement or the sealed transcript from ALI. Specifically, the two releases are unambiguous and are integrated documents so far as the issues before me are concerned. If I were to consider the Settlement Agreement and the sealed transcript, however, they would not affect the conclusions I have reached in this decision. Nothing in the Settlement Agreement amounts to a promise “to allow the Prawer’s to continue with this case and to share in any recovery,” Tr. of Proceedings, July 11, 1997, at 8, any “gentlemen’s agreement” referred to in the sealed transcript would be unenforceable and the dialogue of the sealed transcript belies any claim that unspoken consideration for the unenforceable “gentlemen’s agreement” was Fleet’s and RECOLL’s agreement to let the Prawer’s pursue this case as parties.

agreeing to “take no action of any kind to pursue or assist in [their] further processing . . . .”

There were no exceptions.

At the time, the private relators had a federal claim accruing against Fleet and RECOLL for legal fees, costs and expenses in this very lawsuit that they had initiated as *qui tam* plaintiffs. Specifically, under the False Claims Act, “[a]ny [*qui tam* plaintiff] shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys’ fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.” 31 U.S.C. § 3730(d)(1).<sup>2</sup> The language of the February 7, 1995, settlement, therefore, released any claim the private relators had against the defendants Fleet and RECOLL for expenses, attorney fees and costs that they had incurred as of that date in this lawsuit. The 1995 release did not affect the substance of this lawsuit, however, because, once the Government had intervened in 1994, it became the Government’s, not the private relators’, substantive claim to dispose of. See id. § 3730(c)(1).

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<sup>2</sup> In light of this plain language, I reject the relators’ argument at the hearing of July 11, 1997, that their attorney fees claim is the Government’s claim (for the relators’ benefit), not the relators’ claim directly. I also reject the argument in their brief that, because their lawyer is doing so much work in this case, the Government should request part of its legal fees for the private lawyer. See Supp. Mem. in Opp’n to Defs.’ Mot. at 10-12. I have reiterated time and again that under the statute the Government, *not* the private relators, has the primary responsibility for this lawsuit. See 31 U.S.C. § 3730(c)(1). Next, the fact that the Government in ¶ 5 of the Amended Complaint refers to section 3730(a) as the basis for jurisdiction does not change the fact that this started as a *qui tam* lawsuit under section 3730(b)(1) and the Government intervened in a *qui tam* lawsuit under section 3730(b)(2). Any rights the private relators have derives from that status. Finally, the case cited by their lawyer at the hearing makes clear that the private relators are able to waive the claim for attorney fees. United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equipment, Inc., 89 F.3d 574, 577 (9th Cir. 1996), cert. denied, 117 S. Ct. 945 (1997).

An earlier release went even farther. On March 11, 1994, these private relators released Fleet and RECOLL from “past, present and/or future” “claims . . . (and any and all other claims related thereto) which were asserted, or could have been asserted in the matter of United States, ex rel., [sic] S. Praver & Company, et al. v. Fleet Bank of Maine, et al., U.S. Dist. Ct. Civil No. CV-93-165-P-C and Appellate Nos. 93-1724, 93-1765 and 93-1766,” and agreed to “take no action of any kind” to pursue such claims. The docket numbers referred precisely to this very lawsuit. Then, on April 4, 1994, the private relators together with Fleet and RECOLL filed a joint motion in the First Circuit Court of Appeals to dismiss the then pending appeal in this lawsuit as well as the underlying district court action as to these two defendants. See App. No. 93-1766, Joint Motion for Dismissal at 2. In their motion to the Court of Appeals they stated: “Appellants [private relators] have settled this case as to Fleet and RECOLL only.”<sup>3</sup> Id. The First Circuit issued its opinion about a month later, but declined to address the joint motion to dismiss, stating instead that it was for the district court to decide. United States ex rel. S. Praver & Co. v. Fleet Bank of Maine, 24 F.3d 320, 329 (1st Cir. 1994).<sup>4</sup> Now the effect of both the 1994 and 1995 releases comes before me for ruling for the first time on the present motion, namely Fleet’s

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<sup>3</sup> Because other defendants remained as parties in the case (this was at a time prior to severance of the so-called lawyer defendants, see Order of Sept. 15, 1995, Civ. No. 95-321-P-H), the joint motion to dismiss did not moot the case in the Court of Appeals.

<sup>4</sup> By stating that “we leave these matters for the district court to decide *after* the government determines whether or not it will intervene,” United States ex rel. S. Praver & Co., 24 F.3d at 329, arguably the Court of Appeals intended the motion to dismiss to remain pending for decision in this court. If so, I had previously been unaware that it required action by me.

and RECOLL's so-called "Motion for Non-Joinder of Relators or, Alternatively, to Restrict Relators' Involvement."<sup>5</sup>

The broad language of the 1994 release foreclosed all expenses, attorney fees and costs in this lawsuit—past, present and future—to the private relators. It also purported to restrict what the private relators could do or claim in this lawsuit by providing that they would "take no action of any kind." The private relators, however, argue that the language of the 1995 release overrides any such conclusions from the 1994 release, because in 1995 the parties also mutually released each other from all claims based upon "contracts" and similar undertakings. According to the private relators, the 1994 release, as a contract, is thereby made unenforceable by the 1995 release.

Perhaps the 1995 release does prevent Fleet and RECOLL from suing the private relators for injunctive relief or damages for any "breach" of the 1994 release. But it is a separate question whether the private relators in 1994 surrendered certain rights and, if so, whether those rights have been resurrected. In fact, the 1994 release clearly did surrender the private relators' right to recover attorney fees, expenses and costs in this lawsuit, and nothing in the 1995 agreement resurrected it. Any such claims therefore cannot succeed.

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<sup>5</sup> I reject the private relators' argument that Fleet's and RECOLL's failure to press the matter earlier somehow is a waiver or amounts to subsequent performance by the parties that demonstrates a different meaning than the clear words of the release. These lawsuits have involved extraordinarily complex and acrimonious exchanges that have frequently diverted attention from the substantive issues. Moreover, since the lawyer defendants at first remained in the case, the Government quickly elected to intervene against Fleet and RECOLL, initially all these claims were part of one action, and even after severance a motion to rejoin them continued for some time, any dismissal between the private relators and Fleet and RECOLL for a long while would have been mostly a technical exercise.

This conclusion does not countenance a counterclaim or a suit for breach of contract; it is simply a recognition that the Prawers surrendered certain rights in 1994 and never got them back.

The 1994 release also provided that the private relators “will take no action of any kind to further pursue” any claims they have in this lawsuit. The relators concede that this language, if enforceable, means that “the Prawers may not assist the Government with this False Claims Act case.” Relators’ Opp’n to Defs.’ Mot. at 5 (footnote omitted). Here, however, the private relators’ argument about the effect of the 1995 release carries some weight. If Fleet and RECOLL are seeking to have this court order the relators not to assist the Government in pursuing its direct false claim, then they are in fact seeking to enforce the 1994 “contract” by way of specific performance. That may be foreclosed by the 1995 agreement; in any event, I conclude that such an agreement is unenforceable under the False Claims Act and public policy. See EEOC v. Astra USA, Inc., 94 F.3d 738, 744-45 (1st Cir. 1997) (concluding that a non-assistance settlement agreement prohibiting communication with the EEOC “sows the seeds of harm to the public interest” and is “void as against public policy”); United States ex rel. Hall v. Teledyne Wah Chang Albany, 104 F.3d 230, 233-34 (9th Cir. 1997); United States ex rel. Green v. Northrop Corp., 59 F.3d 953, 963-68 (9th Cir. 1995), cert. denied, 116 S. Ct. 2550 (1996). At the time the Prawers signed the release, only

they, as private relators, were plaintiffs in the False Claims Act lawsuit.<sup>6</sup> The Government exercised its right to enter the lawsuit as a plaintiff later; it cannot be prevented by private agreement from being able to pursue its claim and to enlist whatever evidence it needs to do so or, indeed, to receive voluntary assistance from the private relators.

What the Prayers did give up substantively in the 1994 agreement, however, was their statutory “right” under section 3730(c) “to continue as a party to [this] action.” Specifically, at the time of the release, the private relators had a claim in the name of the Government under section 3730(b). This claim was subject to being reduced to “the right to continue as a party” under section 3730(c) if the Government intervened—as it did here—under section 3730(b)(2). In surrendering all “claims,” “actions, causes of action, suits,” “controversies” and “complaints” (the list is far longer, but these terms are the most pertinent), the private relators gave up both the larger and the smaller right. Nothing in the 1995 agreement resurrected this surrendered right. I conclude, therefore, that whatever the private relators may choose to do out of court in assisting the Government (and whatever economic incentive they may have to do so given their potential recovery rights under

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<sup>6</sup> Before the Government moved to intervene, any settlement or voluntary dismissal of the lawsuit would have required notice to and possibly even consent by the Government. See 31 U.S.C. § 3730(b)(1), (c)(3). At the present stage, however, the Government takes no position on the motion before me except to request that it not be denied any voluntary assistance from the private relators, a request that is fulfilled in the text of this Order. Because the Government has duly intervened and is prosecuting the case to protect its interests, I find the caselaw cited by the private relators to be inapplicable.

section 3730(d)), they are entitled to no further active role in the court proceedings in this lawsuit.<sup>7</sup>

I therefore **GRANT** the so-called “Motion for Non-Joinder or, Alternatively, to Restrict Relators’ Involvement.” Notice of further proceedings need be given to the private relators only upon settlement or judgment, when their section 3720(d) interests will be at stake.<sup>8</sup>

In sum, what is left for the private relators at this point is to seek a percentage share in any recovery the Government ultimately obtains by way of judgment or settlement under section 3730(d). To enhance that share they are free under my Order to assist the Government in any way that the Government permits them. But they are no longer parties to this lawsuit and their lawyer is therefore not entitled to be copied on further proceedings until the stage of final disposition is reached. This conclusion fully recognizes the principle

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<sup>7</sup> This is a separate reason for no further accrual of attorney fees, expenses and costs under the statute.

<sup>8</sup> In their latest brief, the private relators argue that comments made by Fleet’s and RECOLL’s lawyer at a court hearing in 1996 that the private relators’ lawyer was “obsessed” with the case support their argument. See Relators’ Mot. for Leave to File a Reply to Fleet Bank of Maine’s and RECOLL Management Corporation’s Argument Concerning the Sealed Tr. of Proceedings before Hon. Gene Carter on Nov. 10, 1994, at 2. The context of the hearing of April 5, 1996, which is apparent from the transcript, clearly reveals that these comments were made on a different issue and do not support the private relators’ argument.

The private relators even argue that the ALI settlement transaction involved a personal bargain on the part of their lawyer in exchange for the relators’ continuation in the *qui tam* lawsuit. Id. at 3. It is noteworthy that the brief literally underlines the lawyer’s interest and leaves the clients’ interest to a parenthetical. Id. Two comments are in order. First, I have serious doubts about the propriety and enforceability in either direction of such an agreement. Second, as the text reveals, I am sustaining on other grounds the private relators’ argument that they can continue to cooperate with the Government in seeking a favorable resolution of this lawsuit that may ultimately benefit them economically, but I am not permitting them to continue as parties. That is still the correct resolution of the case based upon the clear language of the releases. See supra note 1.

as advanced in the relators' final brief that the *qui tam* action involves the claims of the Government and not the claims of the Prawers. The Government is able to proceed without hindrance and with whatever assistance it chooses to obtain from the Prawers. At the same time, this Order recognizes that the Prawers by their earlier releases surrendered certain rights.

**SO ORDERED.**

**DATED THIS 19<sup>TH</sup> DAY OF AUGUST, 1997.**

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**D. BROCK HORNBY**  
**UNITED STATES CHIEF DISTRICT JUDGE**